TAN TIEN SENG

v.

GROBINA RESORTS SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO. 24-537-2000]
23 JUNE 2006

CIVIL PROCEDURE: *Execution - Stay - Application for stay of execution pending appeal - Special circumstances - Whether established*

This was the defendant's application in encl. 56 for an order that execution of the judgment of the court ('the judgment') be stayed until the disposal of the defendant's appeal by the court of appeal. In the judgment, the plaintiffs have obtained, *inter alia*, an order for the rescission of the sale and purchase agreement for the unit in the defendant's condominium and an order for repayment by the defendant. The defendant's affidavit in support advanced the following grounds: (1) the defendant had a good and arguable case in the appeal as the defence based on the plaintiffs' acquiescence, waiver and election and s. 40 of the Contracts Act 1950 was not given any consideration; (2) the defendant had agreed and undertook to deposit with the High Court some of the unencumbered strata titles of the condominium units from which the plaintiffs purchased their unit to satisfy the order; (3) execution of the judgment would 'kill off' the defendant as a going concern which was currently undertaking some housing development projects approved by the appropriate authorities and the construction and development works were currently intensively underway; (4) the plaintiffs would not be prejudiced since interest continued to run on the judgment sum and (5) in the event the defendant's appeal to the Court of Appeal was successful, payment of the judgment sum to the plaintiffs as Singapore citizens would render it extremely difficult and costly to get the refund from the plaintiffs. The defendant relied on *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* to support the contention that the above grounds constituted special circumstances. The plaintiffs objected and submitted that the defendant failed to establish special circumstances.

Held:

(1) The defendant's pending appeal and the mere filing of an appeal to the Court of Appeal could not provide a reason for allowing the stay, as the plaintiffs must not be deprived of the fruits of their litigation *(Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd (No 2))*. Merits or strong grounds for an appeal or the validity or correctness of the decision appealed from are not special circumstances. This court should not make a finding that the appeal is doomed to failure, or there are merits in the appeal. (paras 12, 13 & 14)

(2) The deposit of the unencumbered strata titles which have nothing to do with the unit purchased by the plaintiffs would not serve any practical purpose. The plaintiffs' priority was obviously to have the judgment sum satisfied by the defendant. The defendant had not shown any intention, and this court was unable to find any evidence, that the defendant had ever endeavoured to dispose of the units in question in order to realize the proceeds of sale to satisfy the judgment sum, or alternatively to deposit these unencumbered titles with a bank or financial institution by way of security for the purpose of raising the judgment sum which in turn may be deposited in the joint solicitors' account pending the disposal of the appeal in due course. That would be a more appropriate and practical solution which would have taken into consideration the mutual interest of the parties herein. This ground was not accepted as special circumstances. (para 15)

(3) The defendant was a large-scale multi-project housing developer enjoying very sound financial health, in which case it was hardly possible for the defendant to be 'killed off' or destroyed by the defendant's satisfaction of the judgment sum which represented a miniscule fraction of the astronomical costs of all the defendant's projects. The judgment sum reflected the purchase price for the unit paid by the plaintiffs as purchasers to the defendant as vendor. The defendant's fears were not special circumstances. (para 21)

(4) This court was unable to accept the ground that the plaintiffs would not be prejudiced as special circumstances. The plaintiffs as successful litigants were more concerned with the recovery of the judgment sum. They should not be deprived of the fruits of the judgment obtained in their favour. (para 23)

(5) Although the plaintiffs are Singaporean citizens outside the jurisdiction of our courts, from the inception of this litigation in 2000, the defendant has never doubted the strong financial position of the plaintiffs who had from 1994 to 1998 paid the full purchase price by cash and against whom the defendant had never seen the need to apply for security for costs in this civil suit. The ground raised here did not constitute special circumstances. (paras 24 & 27)

(6) To balance the respective rights of the parties herein and to maintain the integrity of the defendant's appeal, it was fair, just and equitable to allow a conditional stay, which shall lapse upon the non-fulfillment of any of the conditions by the defendants and the defendant's solicitors or their respective successors in title. (para 28)

[This court made an order of conditional stay, subject to all the conditions as enumerated; parties to bear their own costs respectively.]

Case(s) referred to:

Chaw Anui v. Tan Kim Chai (No 2) [2005] 5 CLJ 171 HC ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***

Government of Malaysia v. Datuk Hj Kadir Mohamad Mastan & Another Application [1993] 4 CLJ 98 HC ***(refd)***

Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd (No 2) [2003] 7 CLJ 273 HC ***(refd)***

ITG Marketing Sdn Bhd v. Tatston Sdn Bhd & 4 Ors [2002] 1 LNS 286 ***(refd)***

Tan Tien Seng v. Grobina Resorts Sdn Bhd (No. 2) [2005] 7 CLJ 70 HC ***(refd)***

Kontiki Trading Pte Ltd v. Protama Sdn Bhd & Ors [1998] MLJU 415 ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan (Leong Yok Chin Intervener) [1996] 4 CLJ 256 ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Ngan Ping Woon v. Rabobank Asia Limited [1997] HKCU Lexis 642 ***(refd)***

Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***

A *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC* ***(refd)***
Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd [1995] 2 CLJ 665 HC ***(refd)***
Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd [2002] 7 MLJ 119 ***(refd)***
B

Legislation referred to:
Contracts Act 1950, s. 40

For the plaintiff - Claudia Cheah Pek Yee (Sharon Tan Geok Bee with her); M/s Skrine
C *For the defendant - FH D'Cruz (BP Yap with him); M/s Bell & Lee*

Reported by Suhainah Wahiduddin

D

JUDGMENT

Low Hop Bing J:

Application

E **[1]** This is the defendant's application in encl (56) for an order that execution of the judgment of the court delivered on 14 July 2005 ("the judgment") be stayed until the disposal of the defendant's appeal by the Court of Appeal.

F **The Judgment**

[2] After a full trial, I gave judgment for the plaintiff in the following terms:

G (a) A declaration that the defendant is in breach of the sale and purchase agreement dated 3 January 1995 executed between the plaintiffs and the defendant ("the SPA") in respect of the property known as Parcel No. 16-01 of No. 01-Pent 7 ("the unit") in Tanjung Samudera Kondominium Beach Resort ("the Condo Project");

H (b) A declaration that the plaintiffs have effectively rescinded the SPA in respect of the unit *ab initio*;

(c) An order for repayment by the defendant of:

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(i) RM844,443 being the purchase price of the unit;

(ii) RM8,800.62 being the sum of all deposits, charges and property tax paid by the plaintiffs in respect of the unit; and

(iii) S$650 being the legal fees paid by the plaintiffs in respect of the SPA for the unit;

(d) General damages;

(e) Interest on all sums payable by the defendant at the rate of 8%p.a. from 7 March 2000 until realisation;

(f) Costs; and

(g) A declaration that the plaintiffs are entitled to a lien on the unit for the said purchase price, damages, interest and costs recovered by the plaintiffs in this action. (See *Tan Tien Seng v. Grobina Resorts Sdn Bhd (No. 2)* [2005] 7 CLJ 70).

Defendant's Grounds

[3] The defendant's affidavit in support advanced the following grounds:

(1) The defendant has a good arguable case in the appeal as the defence based on the plaintiffs' acquiescence, waiver and election and s. 40 of the Contracts Act 1950 was not given any consideration ("Ground 1");

(2) The defendant agrees and undertakes to deposit with the High Court some of the unencumbered strata titles of the condominium units from which the plaintiffs purchased their unit to satisfy the order ("Ground 2");

(3) Execution of the judgment would "kill off" the defendant as a going concern which is currently undertaking some housing development projects in Melaka which have been approved by the appropriate authorities and the construction and development works are currently intensively underway ("Ground 3");

(4) The plaintiffs would not be prejudiced since interest continues to run on the judgment sum ("Ground 4"); and

(5) In the event the defendant's appeal to the Court of Appeal is successful, payment of the judgment sum to the plaintiffs as Singapore citizens would render it extremely difficult and costly to get the refund from the plaintiffs ("Ground 5").

Special Circumstances

[4] Mr. FH D'Cruz, assisted by Mr BP Yap, relied on *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 FC ("Kosma") to support their contention that the above grounds constitute special circumstances.

[5] Miss Claudia Cheah Pek Yee (Miss Sharon Tan Geok Bee with her) objected and submitted for the plaintiffs that the defendant has failed to establish special circumstances.

[6] In my view, the principles governing the grant or refusal of a stay of execution of judgment have gone through thorough judicial consideration. It is now trite law that in an application for stay of execution of judgment (including stay of proceedings), it is incumbent upon the applicant to show special circumstances: *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 HC; *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA; and *Kosma, supra,* which appears to have overruled the decision to the contrary effect in *See Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* [1997] 2 CLJ 299.

[7] *Kosma supra,* was followed recently by the Court of Appeal in *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465 CA per Azmel Maamor J (now JCA).

[8] What constitutes special circumstances is a question of fact in each individual case. A special circumstance must be something distinctive and out of the way: *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 per Abdul Malik Ishak J.

[9] Special circumstances ... must be special under the circumstances as distinguished from ordinary circumstances ... Something that exceeds or excels in some way that which is usual or common.": *Mallal's Supreme Court Practice* at p 573, referred to by Abdul Hamid Mohamad JCA (now FCJ) at p 392 in *Ming Ann Holdings, supra.*

[10] In *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 at p 521 Ian Chin JC (now J) explained that the answer to what constitutes special circumstances is to be ascertained by way of an exercise of discretion having regard to established judicial principles and the facts of each case, and that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts and that the list of factors constituting special circumstances is infinite and could grow with time.

[11] Having stated the above principles, I shall now consider the aforesaid grounds.

Ground 1: Good Arguable Case In The Appeal

[12] The defendant's pending appeal and the mere filing of an appeal to the Court of Appeal could not provide a reason for allowing the stay, as the plaintiffs must not be deprived of the fruits of their litigation: per Abdul Malik Ishak in *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd (No 2)* [2003] 7 CLJ 273 at pp 281 b-d, h, 283 and 284a.

[13] Merits or strong grounds for an appeal or the validity or correctness of the decision appealed from are not special circumstances: per NH Chan J (later JCA) in *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 which was followed by Abdul Malik Ishak J in *Hariram Jayaram, supra,* at p 283 d-e.

[14] In any event, I should not make a finding that the appeal is doomed to failure, or there are merits in the appeal: see *Ming Ann Holdings, supra,* at pp. 405-406 per Abdul Hamid Mohamad JCA (now FCJ). I must not be a judge of the correctness or incorrectness of my own judgment or for that matter, whether the defendant has a good arguable case in the appeal. That is the exclusive jurisdiction of the Court of Appeal or the Federal Court, at the stage of the hearing and determination of the appeal in due course (see also *Ming Ann Holdings, supra,* at p 406, *ibid*).

Ground 2: Deposit Of Title Deeds

[15] In the judgment, the plaintiffs have obtained *inter alia* an order for the rescission of the sale and purchase agreement for the unit in the defendant's condominium. Except for the unit which is the subject matter of this litigation, the defendant has evinced an

intention to have nothing to do with the defendant's condominium. In my view, the deposit of the unencumbered strata titles which have nothing to do with the unit purchased by the plaintiffs would not serve any practical purpose. The plaintiffs' priority is obviously to have the judgment sum satisfied by the defendant. The defendant has not shown any intention, and I am unable to find any evidence, that the defendant has ever endeavoured to dispose of the units in question in order to realise the proceeds of sale to satisfy the judgment sum, or alternatively to deposit these unencumbered titles with a bank or financial institution by way of security for the purpose of raising the judgment sum which in turn may be deposited in the joint solicitors' account pending the disposal of the appeal in due course. In my view, that would be a more appropriate and practical solution which would have taken into consideration the mutual interest of the parties herein.

[16] Hence, I am unable to accept Ground 2 as special circumstances.

Ground 3: The Defendant Is A Going Concern

[17] The short answer to Ground 3 is to be found in *Kosma, supra,* where the applicants highlighted the losses they would suffer if the stay was not granted. Augustine Paul JCA (now FCJ) delivering the judgment of the Federal Court and dismissing the application for stay, held that this line of reasoning militated against the rationale that a stay is granted only for reasons that relate to the enforcement of the judgment and not to give the unsuccessful party time to satisfy the judgment or to alleviate its problems.

[18] It is instructive to refer to the judgment of Abdul Hamid Mohamad JCA (now FCJ) in *Ming Ann Holdings, supra*. His Lordship at p 407 said:

> The grounds ... are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing supplies, fear of losing goodwill, fear of not being able to collect its debts from third parties ... All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.

[19] The above judgment was affirmed in *Kosma, supra.*

[20] In *Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd* [2002] 7 MLJ 119, Abdul Malik Ishak J reiterated his view in *Wu Shu Chen (the sole executrix of the estate of Goh Keng How, deceased)*

v. Raja Zainal Abidin bin Raja Hussin & Anor [1996] 2 CLJ 353 that a large judgment sum of about RM26 million awarded in favour of the plaintiff did not constitute special circumstances. Hardship and financial burden as in *Lim Kok Liam & Sons Sdn. Bhd. v. Lau Choon Wan (Leong Yok Chin Intervener)* [1996] 4 CLJ 256; and disruption of business as in *Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd* [1995] 1 MLJ 339, could not constitute special circumstances.

[21] Ground 3 gives me the *prima facie* impression that the defendant is a large-scale multi-project housing developer enjoying very sound financial health, in which case it is hardly possible for the defendant to be "killed off" or destroyed by the defendant's satisfaction of the judgment sum which represents a miniscule fraction of the astronomical costs of all the defendant's projects. It must be remembered that the judgment sum reflects the purchase price for the unit paid by the plaintiffs as purchasers to the defendant as vendor.

[22] In my view, the defendant's fears are not special circumstances.

Ground 4: Plaintiff Not Prejudiced

[23] I am unable to accept Ground 4 as special circumstances. It is axiomatic that the plaintiffs as successful litigants are more concerned with the recovery of the judgment sum and that they should not be deprived of the fruits of the judgment obtained in their favour: *Wu Shu Chen, supra; Ming Ann Holdings, supra;* and *Kosma, supra.*

Ground 5: Plaintiffs Are Singapore Citizens

[24] In relation to Ground 5, although the plaintiffs are Singapore citizens outside the jurisdiction of our courts, it is to be noted that from the inception of this litigation in 2000 ie, some six years ago, the defendant has never doubted the strong financial position of the plaintiffs who had from 1994 to 1998 paid the full purchase price by cash and against whom the defendant had never seen the need to apply for security for costs in this civil suit.

[25] A case directly in point is to be found in *Kontiki Trading Pte Ltd v. Protama Sdn Bhd & Ors* [1998] MLJU 415, where the plaintiff has obtained judgment. Pending hearing of the appeal in the Court of Appeal, the third and fourth defendants applied for

a stay of execution of judgment on the ground that the plaintiff is a company registered and based in Singapore and that it would be extremely difficult to get back the money paid over to the plaintiff in a place outside our jurisdiction. Tee Ah Sing J dismissed the application as the plaintiff was, *inter alia*, not insolvent, adding that there was no evidence that the foreign company was prone to dissipating its assets and money or was facing financial difficulties.

[26] His Lordship also applied the distinction between a default or summary judgment and a judgment obtained after a full trial, as is the case before me, so that the plaintiffs as successful litigants should not be deprived of the fruits of their victory.

[27] In my view, Ground 5 does not constitute special circumstances.

Conditional Stay

[28] Notwithstanding the fact that none of the above grounds could constitute special circumstances, I am mindful of balancing the respective rights of the parties herein and maintaining the integrity of the defendant's appeal. I am therefore prepared to consider a conditional stay as a fair, just and equitable solution to the parties herein, having regard to the defendant's apprehension based on the foreign element in Ground 5.

[29] Conditional stays have been granted by me in *ITG Marketing Sdn Bhd v. Tatston Sdn Bhd & 4 Ors* [2002] 1 LNS 286; and *Chaw Anui v. Tan Kim Chai (No 2)* [2005] 5 CLJ 171.

[30] A similar approach in giving a conditional stay was adopted in:

(1) the English Court of Appeal through the judgment of Staughton LJ in *Wimbledon & South West Finance Company Ltd v. Everest and Another* (LexisNexis, judgment delivered on 11 July 1990);

(2) the High Court of Hong Kong in *Ngan Ping Woon v. Rabobank Asia Limited* [1997] HKCU Lexis 642 by Leong J; and affirmed by Ching JA and Anthony G. Rogers J; and

(3) our Court of Appeal in *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Anor Appeal* (Malaysian Bar Website, 1 March 2006).

[31] Reverting to the application before me, I am of the view that it is fair, just and equitable to allow a conditional stay, subject to all the following conditions:

(1) the deposit, on or before 17 July 2006 by the defendant, of the total judgment sum as stated in para (c)(i), (ii) and (iii) under the caption "judgment" above, together with all interest accrued to the date of the deposit being effected, in an interest bearing solicitors clients account jointly held and managed by the plaintiffs' solicitors and the defendants' solicitors;

(2) the said deposit together with all interest accrued shall not be released save and except in compliance with an order of this court or the Court of Appeal, pursuant to this suit or the said appeal as the case may be; and

(3) on or before the 17th day of each month, beginning July 2006, the defendant's solicitors shall write to the registrar of the Court of Appeal to request for an early date of hearing for the defendant's appeal, with a copy thereof to the plaintiffs' solicitors and the registrar of this court.

[32] The conditional stay shall lapse upon the non-fulfilment of any of the above conditions by the defendants and the defendant's solicitors or their respective successors in title, as the case may be.

Conclusion

[33] On the foregoing grounds, pursuant to the defendant's application in encl (56), I make an order of conditional stay, subject to all the conditions as enumerated above. Parties to bear their own costs respectively.